SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 226

SILVER, INC., a corporation, MOORE-ADDISON CO., a corporation, B S R (USA) LIMITED, a corporation, HABER CORPORATION, a corporation, SPIC & SPAN SERVICE STATIONS, INC., PAULINE HAFFA, DORA HAFFA, MAE HAFFA and TITUS HAFFA (being Creditors), and DORA HAFFA, MAE HAFFA, PAULINE HAFFA, TITUS HAFFA, ETHEL HAFFA, EUGENE BERGERON and JACK M. LACHMANN (being Shareholders),

Petitioners,

vs.

WEBCOR, INC., WEBCOR SALES COMPANY, INTERNATIONAL FASTENER RESEARCH CORPORATION, and DYNAMICS CORPORATION OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Bergeron and Jack M. Lachmann (being Shareholders), pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 12, 1968.

CITATIONS TO OPINIONS BELOW.

The Referee in Bankruptcy's orders are unpublished and unreported and are contained in the certified record and printed in the appendix hereto at pages 55 to 61. The District Court entered no order containing findings of fact or conclusions of law and its minute orders denying relief to appellants are unreported and contained in the certified record. Said orders are printed in the appendix hereto at pages 53 and 54. The opinion of the Court of Appeals is reported in 392 F. 2d 893 and printed in the appendix hereto at pages 37 through 47.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on January 12, 1968 (see pages 48 to 50 of the appendix hereto); its opinion was filed on February 7, 1968, and petitions for rehearing and rehearing en banc were denied on March 27, 1968 (see pages 51 and 52 of the appendix hereto). Jurisdiction of this court is invoked pursuant to 11 U. S. C. sec. 716, 11 U. S. C. Sec. 47(c) and 28 U. S. C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. May the Bankruptcy Court, because it has received an offer for the purchase of all of the debtors' assets, halt the attempt of a publicly-held corporation to effect an arrangement with its unsecured creditors and order

liquidation, where no emergency exists and all evidence points to the possibility of financial rehabilitation?

2. Where a debtor-bankrupt publicly-held corporation has filed a plan of arrangement and before a sale of its assets has been conducted, moved the court to enter an order halting liquidation, thereby permitting it to promulgate a plan of arrangement, does the Bankruptcy Court have a duty to cease liquidation efforts, on indemnity to all parties, until the plan is investigated, or should the court proceed to a sale?

3. Having proceeded to an auction of the debtor-bankrupt's assets while an uninvestigated plan of arrangement is pending, and a deposit to implement the plan is proffered, should the Bankruptcy Court summarily reject the plan and accept the bid without factually determining which method of producing payment to creditors would bring the greatest return and is in the best interest of all parties?

4. May a publicly-held corporation seek to promulgate a plan of arrangement at any stage of a bankruptcy proceeding and where that plan, and the deposit implementing it, by unanimous agreement of the trustee, the debtor and the creditors committee, preserves an equity in existing public shareholders, recreates a going concern, and produces a greater payment to creditors than the highest bid made for liquidation, is the Bankruptcy Court justified in refusing to permit the debtor to promulgate its plan when no vested rights would be disturbed and no innocent bona fide purchasers prejudiced?

STATUTES INVOLVED.

11 U. S. C. sec. 706:

For the purposes of this chapter, unless inconsistent with the context—

(1) "arrangement" shall mean any plan of a debtor for the settlement, satisfaction, or extension of the time of payment of his unsecured debts, upon any terms;

. . .

(3) "debtor" shall mean a person who could become a bankrupt under section 22 of this title and who files a petition under this chapter;

(4) "executory contracts" shall include unexpired leases of real property; and

(5) "petition" shall mean a petition filed under this chapter by a debtor proposing an arrangement.

11 U. S. C. sec. 721:

Filing petition; pending bankruptcy proceeding

A debtor may file a petition under this chapter in a pending bankruptcy proceeding either before or after his adjudication.

11 U. S. C. sec. 722:

Same; original petition

If no bankruptcy proceeding is pending, a debtor may file an original petition under this chapter with the court which would have jurisdiction of a petition for his adjudication.

11 U. S. C. sec. 723:

Contents of petition

A petition filed under this chapter shall state that the debtor is insolvent or unable to pay his debts as they mature, and shall set forth the provisions of the arrangement proposed by him, or, that he intends to propose an arrangement pursuant to the provisions of this chapter.

11 U. S. C. sec. 725:

Petition in pending bankruptcy proceedings as stay

A petition filed under section 721 of this title shall not act as a stay of adjudication or of the administration of the estate, but the court may upon application of the debtor and upon notice to all parties in interest, including the creditors' committee and the receiver or trustee, if any such has been appointed, grant a stay of adjudication or of the administration of the estate upon such terms as may be proper for the protection of the estate and for indemnity against loss thereto or diminution thereof.

11 U. S. C. sec. 756:

An arrangement within the meaning of this chapter shall include provisions modifying or altering the rights of unsecured creditors generally or of some class of them, upon any terms or for any consideration.

11 U. S. C. sec. 757:

An arrangement within the meaning of this chapter may include—

(1) provisions for treatment of unsecured debts on a parity one with the other, or for division of such debts into classes and the treatment thereof in different ways or upon different terms;

(2) provisions for the rejection of any executory contract;

(3) provisions for specific undertakings of the debtor during any period of extension provided for by the arrangement, including provisions for payments on account;

(4) provisions for the termination, under specified conditions, of any period of extension provided by the arrangement;

(5) provisions for continuation of the debtor's business with or without supervision or control by a receiver or by a committee of creditors or otherwise;

(6) provisions for payment of debts incurred after the filing of the petition and during the pendency of the arrangement, in priority over the debts affected by such arrangement;

(7) provisions for retention of jurisdiction by the court until provisions of the arrangement, after its confirmation, have been performed; and

(8) any other appropriate provisions not inconsistent with this chapter.

11 U. S. C. sec. 766:

Requisites for confirmation

The court shall confirm an arrangement if satisfied that—

(1) the provisions of this chapter have been complied with;

(2) it is for the best interests of the creditors and is feasible;

(3) the debtor has not been guilty of any of the acts or failed to perform any of the duties which would be a bar to the discharge of a bankrupt; and

(4) the proposal and its acceptance are in good faith and have not been made or procured by any means, promises, or acts forbidden by this title.

Confirmation of an arrangement shall not be refused . . . because . . . the interest of its stockholders . . . will be preserved. . . ."

11 U. S. C. sec. 776:

Abandonment or rejection of arrangement before confirmation

If an arrangement is withdrawn or abandoned prior to its acceptance, or is not accepted at the meeting of creditors or within such further time as the court may fix, or if the money or other consideration required to be deposited is not deposited or the application for confirmation is not filed within the time fixed by the court, or if confirmation of the arrangement is refused, the court shall—

(1) where the petition was filed under section 721 of this title, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this title; or

(2) where the petition was filed under section 722 of this title, enter an order, upon hearing after notice to

the debtor, the creditors, and such other persons as the court may direct, either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this title or dismissing the proceeding under this chapter, whichever in the opinion of the court may be in the interest of the creditors

11 U. S. C. sec. 793:

Unregistered securities; use of mails and interstate commerce

a. The provisions of section 77e of Title 15 shall not apply to—

(1) any security issued by a receiver, trustee or debtor in possession pursuant to section 744 of this title; or

(2) any transaction in any security issued pursuant to an arrangement in exchange for securities of or claims against the debtor or partly in such exchange and partly for cash and/or property, or issued upon exercise of any right to subscribe or conversion privilege so issued, except (a) transaction by an issuer or an underwriter in connection with a distribution otherwise than pursuant to the arrangement, and (b) transactions by a dealer as to securities constituting the whole or part of an unsold allotment to or subscription by such dealer as a participant in a distribution of such securities by the issuer or by or through an underwriter otherwise than pursuant to the arrangement.

b. As used in this section, the terms "security", "issuer", "underwriter", and "dealer" shall have the meanings provided in section 77b of Title 15.

STATEMENT.

This was an original proceeding instituted by Webcor, Inc., and Webcor Sales Company (hereinafter sometimes referred to as "companies" or "Debtors") to effect an arrangement with their unsecured creditors pursuant to Chapter XI of the Bankruptcy Act. Appeals are prosecuted from the refusal of the District Court to permit

Debtors to promulgate a plan of arrangement and from an affirmation of an order selling all of Debtors' assets.

Webcor, Inc., and its wholly-owned subsidiary, Webcor Sales Company, have engaged in the marketing and distribution of household electrical appliances, phonographs and radios for the United States Government for some fifty years. Appliances are marketed under the trade name "Dormeyer"; all other goods bear the name "Webcor."

The main manufacturing plant is located on Wolcott Avenue in Chicago, Illinois; the parts department on North Avenue in Chicago, Illinois, and the plastic division at Zeeland, Michigan. All told—when manufacturing—it employed in excess of five hundred people. Webcor, Inc., is a publicly-held company, having three thousand shareholders, and was listed on the Midwest Stock Exchange.[1]

In April of 1967, the Companies ceased manufacturing in Chicago, although they continued marketing products contract-manufactured for them by others and continued servicing their products, employing about two hundred thirty persons. On July 5, 1967, the Companies filed a petition pursuant to Chapter XI of the Bankruptcy Act, praying for an arrangement with their more than two thousand creditors. For "good cause shown" extensions of time to file schedules were granted to September 21, 1967.

The Schedules (filed September 21, 1967) and claims reveal: claims entitled to priorities—$263,000.00; unsecured creditors—$2,800,000.00; secured creditors—$1,680,000.00; contingent liabilities of $1,000,000.00[2] and rentals of about $120,000.00 per year.

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1. Webcor, Inc., was delisted upon the filing of the petition although its stock is still traded over the counter.

2. Contingent liability arises in the following manner: While there is a secured loan which is in excess of $1,600,000.00 the security was not all owned by the Companies—$1,000,000.00 is property owned by others who are accommodation-makers. If the Companies liquidate and the property is foreclosed upon, the accommodation-makers would be entitled to recover their loss.

The assets, aside from accounts receivable, consist of: non-perishable heavy and light manufacturing machinery; office furniture, fixtures and IBM equipment; non-perishable finished goods, work in process and raw material; trade names "Dormeyer" and "Webcor"; an $11,000,000.00 tax-loss carry forward; certain vacant property (encumbered) and a plant situated upon leased ground, also encumbered.

Within a short time after the Receiver qualified, all business activities, except parts shipments, ceased upon Court Order.

On July 6, 1967, pursuant to the Companies' application, Frank M. Whiston was appointed Receiver and qualified.

From the date the petition was filed (and especially after the schedules were filed on September 17, 1967) the Receiver, various creditors, third parties, and the Debtors sought to procure the backing necessary to promulgate a Plan of Arrangement. Indeed, respondent, International Fastener Research Corporation (hereinafter referred to as IFR), was in constant communication with the Debtors, attempting to induce the Companies' majority stockholder and the Debtors to permit it to promulgate a Plan of Arrangement. They were unsuccessful.

On October 12, 1967, approximately three months after the filing of the original proceedings and less than three weeks after the filing of the schedules, in this extremely complicated situation an ex parte Order was entered directing the Debtor to file its proposed Plan by October 25, 1967, which order also set a hearing for October 25, 1967, at 2:00 P. M. to consider entering an Order of Adjudication. Appropriate notice was given.[3] The first meeting of creditors was set for that date.

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3. It is interesting to note that the Receiver served notice that on October 12, 1967, he would appear before the Referee to ask for a solicitation of bids. No action was taken on that petition; instead, the above order was entered and notice sent.

On October 17, 1967, during the pendency of the Chapter XI proceedings, the Receiver filed a petition whose only important allegation is:

> "2. That he has received an offer to purchase all these assets of the debtor, exclusive of cash on hand, together with all the assets of Webcor Sales Company, which case is now pending in this Court, Number 67 B 4935, exclusive of the cash on hand in that Company. This offer is in the sum of $1,030,000.00 and has been received from International Fastener Research Corporation, together with an earnest money deposit of $100,000.00. Your petitioner has determined that the International Fastener Research Corporation is a well rated company."

and prayed:

> "WHEREFORE, your petitioner asks that an order may be entered herein authorizing him to sell the assets as hereinabove set forth, free and clear of all liens, by return of bids before this Honorable Court and in accordance with the rules of the Court, to creditors and to the general public; that the said notice recite that a firm offer has been received in the sum of $1,030,000.-00 and that the first bid above that price must be in increments of $50,000.00 and that after the first bid, further bids may then be made in increments of $10,-000.00 . . . ."

Pursuant to that petition, the Court entered an Order

> "That it is the best interests of this estate that the Receiver herein be given leave to solicit bids . . ."

and, accordingly, November 6, 1967, at 2:00 P.M. was set for a return of bids.

On October 25, 1967, the first meeting of creditors convened and the motions previously set came on for hearing. At that hearing, the following events transpired: First, the "feuding" rival Creditors' Committees were fused into one twenty-four man committee representing $1,500,000.00

in claims and officially appointed; Second, the matter of adjudication came on for hearing.

Mr. Nachman, attorney for the Debtor companies, explained the efforts the Debtor was making and that he had just left a meeting with various parties who were desirous of promulgating an Arrangement. He outlined to the Court a proposed Plan[4] and asked that the Order of Adjudication be withheld until November 6, 1967. In this position he was backed by the Creditors' Committee, who said:

> "And it is our suggestion, your Honor, the Creditors' Committee suggestion together with Mr. Nachman's statement that an Order of Adjudication be deferred until November 6th, which is the day of the bid. If we don't have a Plan to submit by that day, we don't intend to delay any longer . . . Therefore, we suggest that an Order of Adjudication be postponed until November 6th."

A former employee of the Companies (since 1940), although pleading for his wages, said:

> "I would like to see this company back in business and I think a lot of people who worked there would like to be back there working because they spent a lifetime there, and I am talking to a lot of these people. I wish the Court could see to it that this company will get back in business."

The former Vice-President of National Video Corporation informed the Court that the Debtor was capable of reorganization and asked until November 6th to formulate a Plan. The only opposition was the Receiver, whose attorney said:

> "Four months have gone by since our doors have been closed in this situation. It is costing this estate a minimum of $25,000 a month just to preserve these

4. In fact, the Plan eventually filed herein.

assets alone.[5] I don't know how much it is costing us in the delay of a sale or a plan. This is hard to calculate, but it is thousands and thousands of dollars. And, I do feel that the creditors, the debtors, and everybody involved in this case have had ample time in the last four months to present a plan of arrangement. And I do think that this Court at this time should enter an order of adjudication unless somebody comes up with a guarantee that we will get at least a million dollars in cash or—for the assets of this estate. I don't want to lose that firm bid that we have today."

The Court entered an Order of Adjudication, saying, however:

"If between now and November 6th a Plan can be formulated that would deserve consideration why we shall consider it."

The Order of Adjudication also set forth the possibility of a plan being filed. On November 2, 1967, after the full Creditors' Committee, at a meeting, approved a proposed Plan, subject only to financial ability, that Plan of Arrangement was filed by the Debtor in the office of the Clerk of the United States District Court.

The Plan provided:

(1)	Payment to all creditors entitled to priorities	$ 263,000.00
(2)	Creditors under $100.00	35,000.00
(3)	Costs of administration	200,000.00
(4)	Expenses incurred after July 5, 1967[6].	200,000.00
(5)	Unsecured general creditors	1,400,000.00
(6)	Shares of A. F. Dormeyer Corporation to be transferred to Debtors, Value—approximately	400,000.00
	Total	$2,498,000.00

5. This $25,000.00 figure was not broken down. It is also interesting to note that during this time the Receiver also collected over $175,000.00 by virtue of sale of finished goods, parts and collection of receivables. None of this was brought to the Court's attention, nor was any report filed.

6. These are the Receiver's expense such as rent, cost of maintaining the property.

The cash requirements of the Debtors, with Dormeyer backing, to meet creditors' payments upon confirmation under the original Plan as filed herein, were the sum of $1,058,000.00, of which the general unsecured creditors would receive $560,000.00 upon confirmation; $840,000.00, of which the general unsecured creditors would receive $560,000.00 upon confirmation; $840,000.00 to be received by them over sixty months in notes guaranteed by A. F. Dormeyer Corporation.

In addition, the Plan would preserve a twenty-one percent interest in present shareholders and require a working capital contribution by A. F. Dormeyer Corporation of $750,000.00.[7]

A. F. Dormeyer Corporation had also guaranteed the Debtor that if the Plan were not confirmed within one year, it would guarantee the estate $1,030,000.00.

On November 6, 1967, pursuant to notice, the Debtor filed its motion to vacate the Order of Adjudication, reinstate the Chapter XI proceeding, halt liquidation, and prayed for a reasonable time to present the Plan to its creditors.

When the Petition came on for hearing, the Creditors advised the Court that they had been willing to accept the Plan, subject to proof of financial ability to carry it out. The debtor also offered to indemnify the estate and all parties for any expense incurred as a result of the return of bids. However, IFR, although then represented at the hearing, even though they were not parties, increased its offer to $1,500,000.00. The Creditors then asked that the bids be taken at 2:00 P. M., and that the Motion be heard after the bids, indicating that there would be ninety percent of the Committee at the 2:00 P. M. hearing. In fact, only

7. The Plan had the added advantage of relieving the estate of contingent claims, of landlords' and payment of certain secured obligations.

twelve of the twenty-four-member Committee did appear and deliberate at said hearing.

The Referee desired to set the Motion over for the next day to "spend the day, if necessary, going into the matter." Mr. Quittner, on behalf of IFR, informed the Court that he could not give assurance that his client would maintain its offer beyond 5:00 P. M. that day so the Motion was taken under advisement until that afternoon.

The hearing was then adjourned until 2:00 P. M. of that afternoon. At that time bids were being taken and Mr. Quittner increased the bid on behalf of IFR to $1,508,000.-00. Whereupon, the Referee addressed Mr Quittner as follows:

> "Referee: International Fastener is aware of the predicament existing. It may be that acceptance or rejection of the bid by the Court may have to be delayed for a day or two. A motion arose this morning which we feel needs to be disposed of before final acceptance or rejection of any bid."
>
> "Mr. Quittner: Your Honor, the offer of International Fastener as of this moment, at least, will expire this evening at 5:00 P. M. If additional circumstances develop which appear compelling, International Fastener . . . might be willing to extend the time until tomorrow morning."

IFR finally bid $1,775,000.00, and again the Referee cautioned that acceptance or rejection of the bids "may be today and it may be tomorrow and it may be a couple of days from now. I just don't know."

After having said: "As I said earlier, is subject to acceptance or rejection when those other matters pending before the Court are disposed of."

During the bidding, Mr. Gesas, representing stockholders and certain creditors, attempted to advise the bidders of a new proposal to be made by the Debtor, and having been denied the privilege by the Court, stated: "We can address ourselves to the Plan after the bidding is concluded."

Thereupon, Mr. Nachman informed the Referee that the Dormeyer interests were behind the Plan of Reorganization and were prepared to make available to the Debtor the sum of $1,800,000.00 in cash the following morning and deposit the same with whomsoever the Court might direct for the purpose of carrying out the Chapter XI Arrangement.

The Referee then suggested that Mr. Gesas and Mr. Nachman get together with the Creditors' Committee and its counsel. Then Mr. Quittner suggested that if the Debtor had serious intentions of depositing $1,800,000.00 to a third party, they should be there with their funds that day, and advised, in answer to an inquiry by Mr. Nachman, that while IFR did not have its money in Court on that day, it could have it there.

Mr. Gesas then informed the Referee that he had $1,800,000.00 in Court to implement the Plan and was prepared to deposit it that afternoon. The Court thereupon adjourned, to be reconvened at 3:30 P.M. It reconvened at 3:30 P.M. and again adjourned to be reconvened at 4:00 P.M.

When Court finally reconvened that afternoon, and although the bidding was not reopened, IFR was authorized to offer $1,825,000.00.

The Creditors' Committee then reported to the court that they recommended the bid of IFR be accepted, stating that a majority of their members had voted for acceptance of the bid. It was not then indicated to the court that of the twenty-four-man committee only twelve were present and seven had voted for the bid and five against. At the conclusion, the Referee stated:

> "I specifically asked Mr. Gesas if his figure was bid and he said it was not. I don't see that it is up to me to reject a bid that was the high bid and has now been

increased, after talking with creditors. And on the recommendation of the Creditors' Committee, the bid of $1,825,000.00 of International Fastener will be accepted.

"Will you prepare a draft order . . .

• • • • •

"In the face of all that has transpired (the motion to vacate) will be denied and the order of adjudication will stand."

No hearing was conducted on the Plan. On November 7, the Referee entered a draft order denying the motion to vacate. The order recited the Creditors' Committee recommendations, the bidding, and that the Plan had been filed without leave of Court. Simultaneously, an order approving the sale was entered, which recited in part:

". . . International Fastener Research Corp. shall pay the full balance of the purchase price to the Receiver . . . Within one banking day after this order becomes final and not appealable . . . In the event that this order does not become final on or before the 11th day after its entry . . . then International Fastener Research Corp. shall in its sole option and discretion be relieved from all the provisions of this order . . ."

On November 15 and 16, Petitions for Review of the Orders of November 7 were filed by appellants, representing $900,000.00 in creditors, $1,000,000.00 in contingent liabilities and 490,000 shares of stock. The Petitions for Review challenged the Referee's orders for their failure to find substantiation in the record, for failure to follow the mandate of the Bankruptcy Act, and for abuse of the discretionary powers vested in him.

On November 16, 1967, a Motion to Stay, pursuant to Section 39 (c) was made by appellants. We asked that conditions be set protecting all parties. This was denied. Nor was a three-day extension for the period of review granted, since:

"Referee: You have to appreciate the scarceness of time available here to do anything."

Not even a one-day extension was available.

Moreover, when counsel sought to introduce pertinent evidence to support his position, not only was that evidence excluded, but an offer of proof was denied.

On November 17, 1967, appellants filed a petition to stay the enforcement of the Referee's Orders before the District Judge to whom the petitions for review had been assigned. The District Court was engaged, so hearing on said petition was continued until November 20, 1967, the day on which the petitions for review were set and IFR agreed not to withdraw its bid until 5:00 P.M. on November 20.

At the hearing before the Court on November 20, all parties were present. Mr. Nachman, for the Debtor, led off:

"Mr. Nachman: That I have in my possession a certified check in the sum of $1,000,000.00, made payable to the order of Frank Whiston, as Receiver in Bankruptcy of Webcor, Inc., and Webcor Sales Company.

This check, Your Honor, is accompanied by a letter addressed to Mr. Whiston, which has been delivered to Mr. Whiston's counsel, Mr. Kessler, for his examination.

Mr. Kessler and I agree that it would be proper that an order be presented to Your Honor's consideration or the Referee's consideration, depending upon which way your Honor thinks this should be handled, authorizing the Receiver to accept this check on the conditions set out in this letter, and these conditions, I understand, are agreeable to Mr. Kessler, Mr. Whiston's counsel.

Your Honor, this is being done virtually simultaneously with the Debtors' filing an amended arrangement. This is all part of the procedure which we are

now setting forth before your Honor and for this record.

The amended arrangement is being typed in my office now, and will be ready for filing, I hope, before the day is over. It will provide that there will be paid to unsecured Creditors 50 per cent in cash on confirmation of the arrangement.

In addition to those payments, there will be paid all priority claims allowed by the Court, and all costs of administration.

"The Court: When will they get the 50 per cent?

"Mr. Nachman: On confirmation of the plan, your Honor, and if the Committee is able to assist the Debtor in obtaining the necessary consent, and I am confident that the Committee will be able to do this, my best guess this morning, your Honor, and I hope I won't be kept to it, is that certainly by the end of December we ought to have a confirmation on the Chapter XI proceeding. I would hope it would be sooner than that, depending on how well the parties are able to work together, and I know every one is eager to work together.

I should like to point out, also, your Honor, that it is a condition of this deposit that if for any reason a confirmation cannot be obtained on the Chapter XI proceeding, and the property has to be resold, and if the sale produces less than $1,825,000.00 net, that this sum of $1,000,000.00 would be available to make up the deficiency, whatever it might be. This is one of the terms incorporated in this letter addressed to Mr. Whiston."

The Court inquired whether "this proposed Plan contemplates operation . . ." and was answered affirmatively.

The Court was informed that under the Amended Plan the creditors would receive fifty cents on the dollar upon confirmation, and that the shareholders would retain a twenty-one percent interest in a going concern.

The Receiver's attorney then backed the Plan, since it would produce fifty cents on the dollar for creditors, which

was more than the sale would produce. The Creditors' Committee attorney then backed the Plan for the same reason as the Receiver's attorney. Appellants urged acceptance of the Plan. The Receiver, in response to the Court's question, also stated that the Plan was in the best interest of creditors.

IFR—and for the first time Dynamic Corporation of America—objected on the grounds that since an Order confirming the sale had been entered, that Order could be upset only upon proof of fraud or mistake. Argument on said question was pursued and appellants addressed themselves to the matters then pending before the Court, i.e., the petitions for review and the motion to stay. The Court, after saying he was not acquainted with the law, thereupon denied the petitions for review, denied the motion to stay, and sent the matter back to the Referee with "full power to proceed under Chapter XI . . ."

All parties adjourned to the Referee. After familiarizing the Referee with the proceedings before the Judge, argument was begun by IFR and then other parties in interest proceeded. The matter was continued until the following morning, November 20.

At the opening of court the following morning, the Debtor filed a motion to reconsider and an amended Plan. Appellants proceeded to argue, whereupon one of the attorneys for the Creditors' Committee interrupted and requested permission to permit the co-chairman of that Committee to make a statement. IFR objected on the ground that he was not an attorney. Appellants then called him as a witness, but the Court refused to allow him to take the witness stand. Appellants then sought to make an offer of proof, but this was denied.[8]

8. The testimony was important, since Mr. Troy would have testified that the Plan had been accepted by the full Committee before November 2, and that as a result only twelve of the twenty-

Appellants thereupon advised the Referee that they had participated in the hearing only as a matter of courtesy, believing that the District Court's Orders were final appealable Orders, and that they now withdrew to prosecute those appeals.

At 11:00 A.M., on November 21, 1967, Notice of Appeal from the District Court's denial of the Petitions for Review was filed and notice served upon all parties—which notice was read into the record—that appellants were to apply at 2:00 P.M. for supersedeas.

The Referee, after stating that he was sorry he was again called upon the render a hasty judgment without adequately reviewing the matter, denied the motion for reconsideration. The Referee said he was impressed with the sanctity of judicial sales—the hearing adjourned.

The Receiver thereupon gave IFR a Bill of Sale and accepted the purchase price. Appellants were not informed of this until the hearing at 2:00 P.M. before the District Court on the Motion for supersedeas.

At that hearing, IFR and Dynamics urged the Court not to grant any stay since they would miss the Housewares Show and probably would abandon the entire matter. The Judge thereupon denied any stay and affirmed the oral order of the Referee denying the Motion to reconsider; which oral order was reduced to writing on December 5, 1967. Appeal from this affirmance was also prosecuted.

The Circuit Court of Appeals, pursuant to an emergency application, granted a stay upon the posting of $1,025,000.00 in bonds, which was done. The Court also permitted Webcor, the debtor, to intervene as an appellant. On January 12, 1968, the stay was vacated and the Court entered an Order affirming the District Court. On February 7, 1968, the Court's Opinion of Affirmance was filed.

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four members were in attendance on November 6, and that five had voted for the Plan and seven for the sale; that upon polling the entire Committee, all but one backed the Plan. He would have further testified to the advantages of the Plan.

REASONS FOR GRANTING THE WRIT.

1. THE DECISION TO ALLOW THE ORDER OF ADJUDICATION TO STAND IS IN CONFLICT WITH THE BANKRUPTCY ACT AS INTERPRETED BY THE SUPREME COURT.

This proceeding began as an attempt by a publicly held corporation to rehabilitate itself through the use of the provisions of Chapter XI of the Bankruptcy Act.

On June 22, 1938 Congress enacted into legislation Chapter X of the Bankruptcy Act, 52 Stat. 883, and Chapter XI of the Bankruptcy Act, 52 Stat. 903. The avowed purpose of both provisions was to permit a debtor in financial difficulty to use the auspices of the Bankruptcy Act for rehabilitation. See *SEC* v. *American Trailer Rental Co.*, 379 U. S. 594, 617, 85 S. Ct. 513, 526, both at footnote 17 (1965).

After the enactment of these provisions, because of the Supreme Court decisions in *Case* v. *Los Angelos Lumber Products Company, Ltd.*, 308 U. S. 106, 60 S. Ct. 1 (1939), and *SEC* v. *United States Realty & Improvement Co.*, 310 U. S. 434, 60 S. Ct. 1044 (1940), the prevailing view was that a publicly held company seeking rehabilitation was confined to the use of Chapter X.

In 1952 Congress amended Section 366 of the Bankruptcy Act, 11 U. S. C. Sec. 766, by eliminating the necessity that a plan be "fair and equitable," said amendment being for the purpose of abrogating the rule of "strict priority" in Chapter XI proceedings, Senate Report No. 1395, 82nd Congress, 2nd Session, 11 (1952). At the same time Congress amended Section 324 of the Bankruptcy Act, 11 U. S. C. Sec. 724(1) thereby permitting an extension of time for filing schedules "for cause shown."

Largely because of these changes the Supreme Court in *General Stores Corporation* v. *Shlensky,* 350 U. S. 462, 76 S. Ct. 516 (1956), held that Chapter XI was an appropriate vehicle for the rehabilitation of a publicly held corporation.

In 1958 Congress amended Section 323 of the Bankruptcy Act to provide that the debtor need not accompany the petition for an arrangement with a plan 11 U. S. C. 723 (as amended 1958). The purpose of this was to permit "time for the careful drafting of an effective and fair plan of arrangement. . . ." Senate Report 2094, 85th Congress, 2nd Session 1958. Thereafter in *SEC* v. *American Trailer Rental Co.,* 379 U. S. 594, 612, 613, 85 S. Ct. 513, 523 (1965), this court in recognition of the difference between a publicly held company and an individual, specifically authorized protection of public shareholders, including intervention of the United States Securities and Exchange Commission.

This court also recognized, by permitting the protection of the public shareholder in a Chapter XI proceeding, the necessity of treating a publicly held corporation different from that of a private individual or an individually held enterprise seeking relief. In the case of an individual or an individually held enterprise, the debtor adequately represents the economic interest of the applicant since in effect the debtor and the owner are one and the same. On the other hand in a publicly held corporation the shareholder divorced from management, does not even receive notice of the proceedings or any occurrence therein, and has no method, outside of court stewardship, of protecting his vital interests. Moreover, the court recognized that the shareholder divorced from management has no control over the attempts of the debtor to affect the arrangement.

The Court of Appeals, as part of its rationale in sustaining the referee's order of adjudication, has stated that the debtors were dilatory in taking two months to file schedules and that these schedules should have been pre-

pared before institution of the original proceedings. The debtors received extensions for "cause shown" because of the complication of its financial structure. Moreover, the very purpose of the Bankruptcy Act Amendments was to remove this feature from the court's consideration. Thus, the rationale of the Court's holding is in direct opposition to the Congressional enactment.

Furthermore, the penalty inflicted by the Court is against the public investor who has no control over the management and whose interest, by virtue of this Court's decisions became a ward of the Court.

The view of this Court of Appeals that this prolonging of the filing of schedules was prejudicial to the debtor's attempted rehabilitation must, we respectfully submit, stem only from the application of principles governing the actions of an individual before the court rather than from the view of owners divorced from control and management. As such we respectfully submit the holding is in direct conflict with both the Congressional statutes and their interpretation by this Court.

Viewing this proceeding with the same concepts that govern an individual coming before the court has led the Court of Appeals into another error. An individual whose efforts to effect an arrangement are unsuccessful has no cessation of economic life. Relieved of his burdens, which is the purpose of the Bankruptcy Act, he is now permitted to once again continue his economic life. In the case of a publicly held corporation a discharge in bankruptcy without an arrangement means nothing. Where bankruptcy is ordered, the economic life of the corporation and those depending on that economic life is brought to an end. Thus that part of the Act which benefits the individual creates nothing but harm for the public corporation, its shareholders, creditors, employees and the community in which it exists. It is for this reason we respectfully submit

that in every case where an adjudication has been ordered, there has been a finding that rehabilitation is impossible. See *e.g. c.f. John Hancock Mutual Life Ins. Co.* v. *Casey,* 141 F. 2d 104 (1st cir. 1944); *In re Riddlesberg Min. Co.,* 224 F. 2d 834 (3rd cir. 1955).

The test set down by the Supreme Court recognizes this principle. Thus in *SEC* v. *American Trailer Rentals Co.,* 379 U. S. 594, 618, 85 S. Ct. 513, 526 (1965), the court said:

> ". . . it must be recognized that Chapters C and XI were not designed to prolong—without good reason and at the expense of the investing public—the corporate life of every debtor suffering from terminal financial ills. See *Fidelity Assurance Assn.* v. *Sims,* 318 U. S. 608, 63 S. Ct. 807, 87 L. Ed. 1032."

Under the aforesaid decision, before liquidation could be ordered and efforts to rehabilitate called to a halt, the court had to make a determination that there was no possibility of rehabilitation and the financial life of the debtor was terminal. No such determination has ever been made in this proceeding. Indeed a plan of arrangement was filed. That plan clearly demonstrated the possibility of rehabilitation. That plan as amended not only demonstrated that this corporation's economic life was not over, but that the cessation of its economic life would be at the expense of the investing public.

We are not unmindful of the fact that

> ". . . business had ceased to operate approximately two months prior to July 6 and the receiver was expending in excess of $25,000 monthly to preserve their assets. Faced with these facts and with a firm bid for the purchase of the corporations' assets . . ."

Such facts do not support the rationale that rehabilitation was not possible. Indeed the referee made no such findings and recognized the contrary in his order. All facts on the day of adjudication pointed to a contrary position and was

borne out by subsequent events. The decision of the Court of Appeals that liquidation at the expense of the public investor and creditor need not stem from rehabilitation capabilities "results in a decision reflecting the 'particular experience and predilections of the district judge (or referee) involved' . . ." *SEC v. American Trailer Rentals Co.*, 379 U. S. 594, 617, 85 S. Ct. 513, 526 (1965). It was for this reason that the very same contention under similar facts was rejected in *In Re Solar Mfg. Co.*, 176 F. 2d 493 (3rd Cir. 1949), where the court said:

> "If this were all there were to the case, however, it would be a serious question whether we would be justified in saying no to a business transaction urged by the trustees and satisfactory to the court. In the view we take of the case, however, we are not substituting our discretion for theirs. We are saying that the safeguarding provisions of Chapter X are not to be ignored in the sale of the assets of a business unless an emergency exists . . ."

Nor was the Court powerless to act as it indicates in its opinion. November 4, 1967 was a Saturday; by statute therefore the last day to file a petition for review was November 6, 1967, Rule 6, Fed. R. Civ. P., 28 U. S. C. (as amended 1966). The debtor's application for reinstatement of Chapter XI having been filed within that time, the period of review does not begin to run until its denial. See *Pfister* v. *Northern Ill. Finance Corp.*, 317 U. S. 144, 150, 63 S. Ct. 133, 137, footnote 5 (1943). (Not abrogated by statute. The Court of Appeals decision is therefore in conflict with that of the Supreme Court. If this decision stands no longer need orders be based on criteria which furthers the Bankruptcy Act's purpose but solely on the particular predilection of the referee.

2. THE CRITERIA FOR THE REFEREE'S EXERCISE OF DISCRETION PERMITTED BY COURT OF APPEALS OPINION IS IN CONFLICT WITH THE SUPREME COURT DECISIONS.

The Court of Appeals avoided review of the order of adjudication by vesting in the referee discretion to vacate his order, yet it set no standards for the exercise of discretion.

On November 2, 1967, a plan of arrangement was filed by the debtor and on November 6 a motion to reinstate the arrangement proceeding was made. On November 6 there was an attempt to amend that plan. All relief was denied. The order approving the sale and denying the debtor to promulgate its plan was based solely on the recommendation of the creditors' committee. As noted by the Court of Appeals opinion, no findings were made on whether liquidation or the plan would yield more to creditors or be in the best interest of all parties. The Court has now sustained the proposition that the sole basis for the referee's action is the creditors' committee recommendation. If Congress had intended such judicial discretion to be exercised by the committee it would have so provided. Yet the abrogation of judicial responsibility has now been sustained.

Such criteria have been rejected by this Court. In *National Surety Company* v. *Coriell*, 289 U. S. 426, 53 S. Ct. 678 (1933) a plan of composition was approved by the district court without independent findings and solely on the basis of the recommendation of the major creditors. Mr. Justice Brandeis in reversing for a unanimous court said:

> "The nonassenting creditors were entitled to have the plan and their objections considered in an orderly way, and to a decree based on adequate data. The District Court had before it, in support of the plan,

> only informal, inadequate, and conflicting ex parte assertions unsupported by testimony. It undertook to pass upon the wisdom and fairness of the plan of reorganization and the rights of nonassenting creditors. For the proper disposition of these questions, definite, detailed, and authentic information was essential. Such information was wholly lacking." (at page 681)
>
> * * * * *
>
> "Every important determination by the court in receivership proceedings calls for an informed, independent judgment. In the case at bar special reasons existed why the court should have secured adequate, trustworthy information. The proceeding was not an adversary one; and jurisdiction rested wholly upon the consent of the defendant corporation." (at page 682)

If a plan, having majority acceptance, cannot be confirmed without a proper determination of its effect *a fortiori*, it can not be rejected and liquidation ordered without such determination.

The reasoning is simple. Those creditors not before the Court by representation on the creditors' committee have as much right to the Court's protection as those on the committee. The reasoning in this cause is more compelling for here the Court must protect the public shareholder who is otherwise not represented. *SEC* v. *American Trailer Rentals Co.*, 379 U. S. 594, 85 S. Ct. 513 (1965).*

Again in *SEC* v. *American Trailer Rentals Co., supra,* at note 17, Mr. Justice Goldberg noted with approval:

> "This provision has been construed to preclude confirmation of a plan or arrangement where the plan would pay the creditors substantially less than they might expect to realize in liquidation . . ."

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* It would seem imperative in this cause since the twenty-four member creditors committee representing $1,500,000.00 of the debtors' $2,800,000.00 indebtedness only twelve were present and seven voted for liquidation and five for the plan.

Conversely, we submit, that liquidation which realizes less for creditors than a plan can not be confirmed. Yet we respectfully submit no determination of this was made below nor is it required by the Court of Appeals opinion.

Allowing the referee to make a determination without an informed independent inquiry to determine which conflicting alternatives best meet the purpose of the Bankruptcy Act is the very "open-ended discretion . . . which is bound to result in decisions reflecting the 'particular experience and predilection of the district judge involved' . . . 'the consequences, particularly in a multi-judge district would be that substantial rights of the parties would depend on the accident of the calendar—in defiance of the memorable admonition, it will not do to decide the same question one way between one set of litigants and the opposite between another' . . .," rejected by Mr. Justice Goldberg in *SEC* v. *American Trailer Rentals Co.*, 379 U. S. 594, 619, 620, 85 S. Ct. 513, 527 (1965).

For these reasons, we submit, the Court of Appeals' decision is in conflict with those of the Supreme Court.

3. HOLDING THAT A JUDICIAL SALE CAN NOT BE SET ASIDE RENDERS APPELLATE REVIEW MEANINGLESS AND IS IN CONFLICT WITH OTHER CIRCUITS.

On page 7 of the Court of Appeals opinion, that court said:

> "We note at the onset that a confirmed judicial sale such as the one here can be set aside on appeal only if the referee was guilty of an abuse of discretion."

Yet on page 9 of the Court of Appeals' opinion, it said:

> "Once the sale of the assets to I. F. R. C. was confirmed, the existence of fraud, mistake, or a like infirmity would be necessary to set that confirmed sale aside."

Petitioners are unable to determine the criteria to be applied in appellate review of sales in the Bankruptcy Court. Apparently the Court of Appeals meant that an abuse of discretion could only occur if there was fraud, mistake, or an irregularity in following the statute. Such a holding, is in direct conflict with every circuit in which similar matters have come up. See *e.g. Procter & Gamble Mfg. Co.* v. *Metcalf*, 175 F. 2d 207 (9th Cir. 1949); *In re Pure Penn Petroleum*, 188 F. 2d 851 (2d Cir. 1951); *Webster* v. *Barnes Banking Co.*, 111 F. 2d 1003 (10th Cir. 1940); *In Re Solar Mfg. Corp.*, 176 F. 2d 493 (3rd Cir. 1949).

The court's opinion that a judicial sale once confirmed by the referee can not be set aside except for infirmities that appear outside of the record renders appellate review meaningless. If Congress had intended that the referee's action be the final say it would not have vested in the District Court, the Court of Appeals, and this court the power to review bankruptcy sales.

The rationale of the Circuit Court of Appeals was that it was necessary to render judicial sales unassailable in order to permit bidders to freely come into the bidding.

However, in this cause the purchaser at the judicial sale was a participant in the proceedings from the beginning and sought to effect an arrangement itself. At the time of the bidding it knew that a plan had been filed. At the time of the bidding it knew that the debtor would seek to promulgate that plan.

While the law attempts to protect innocent bona fide purchasers, it does not seek to protect those who take subject to infirmities that they are aware of. Here the purchaser was aware at each stage that the plan might be accepted and even the order confirming the sale provided that the sale was not to become final until appeal had been exhausted. Thus, the rationale of the Circuit Court of Appeals stands for the proposition that the mere bidding

creates an unassailable position which though it violates the principles and purposes of the enabling Bankruptcy Act can not be attacked because the "hammer" has fallen. As such it is in direct conflict with *In Re Solar Mfg. Corp.*, 176 F. 2d 493 (3rd Cir. 1949).

That case was a Chapter X. However, the facts and circumstances are very close. In that case the Trustee was operating the business at a loss but had made progress toward overcoming the loss. No plan had been filed as yet. The Trustee petitioned to sell the assets on the basis of a firm bid conditioned upon immediate acceptance which he alleged would be in the best interest of the estate. The referee permitted the sale. The District Court affirmed the sale; the Circuit Court of Appeals reversed, saying:

> "We think that sales under court order not in pursuance of a reorganization plan are to be confined to emergencies where there is imminent danger that the assets of the ailing business will be lost if prompt action is not taken . . .
>
> * * * * *
>
> "The trustees, as appellees, have taken the position that Solar's assets are further rendered 'perishable' by the fact that Sprague's offer is conditioned upon almost immediate acceptance. This contention asserts the self-destructive proposition that an offer of purchase may itself beget the emergency which is prerequisite to its acceptance and suggests that an impatient purchaser may stampede a reorganization court out of the safeguards of Chapter X.
>
> "If this were all there were to the case, however, it would be a serious question whether we would be justified in saying no to a business transaction urged by the trustees and satisfactory to the court. In the view we take of the case, however, we are not substituting our discretion for theirs. We are saying that the safeguarding provisions of Chapter X are not to be ignored in the sale of the assets of a business unless an emergency exists. . . ."

Thus, there is a conflict in the Circuit Courts concerning this important matter.

4. CLASSIFYING THE DEBTOR AS A BIDDER IS IN DIRECT CONFLICT WITH CHAPTER XI.

The Debtor sought, on the afternoon of November 6, 1967, to amend its plan for an immediate pay-out. The only difference in the plan would have been an all-cash immediate payment to creditors instead of a partial cash payment and liquidating dividends. This was attempted before the close of bidding. It sought to make a deposit of $1,800,000.00 at that time to implement this plan. It did, on November 25, 1967, before the District Court, so amend the plan, and informed the court. The normal process of Chapter XI would have permitted it to do so in an orderly fashion and if its motion to promulgate a plan had been ruled upon favorably. It was necessary for it to act speedily because at each stage of the proceeding its plea went unheard. The Court of Appeals has held that the Debtor was actually a bidder and was outbid at the sale.

We respectfully call this court's attention to the fact that from a factual point of view this is untrue. No investigation was made by the referee or the District Court into the question of whether the plan or the bid would yield the greatest amount to the estate. If the debtor was a bidder a determination of which was the high bid should have been made. Moreover, IFR closed its bid at $1,775,000.00. It was permitted to privately encrease it to $1,825,000.00 which appears on the surface to exceed that proffered by the debtor. Over and above this such a classification of the Debtor in a Chapter XI proceeding is completely illogical. This debtor, as any publicly held corporation, has six divisions in its community of interests: the corporation and its controlling shareholders; 3000 public investors,

divorced from control; 2300 unsecured creditors, divorced from control; landlords with limited property control; secured creditors with limited property control and employees. This community of interest must share in its "pot" made up of: manufacturing rights — trade names, patents, copyrights, machinery and equipment; a listing on the Midwest Stock Exchange; an $11,000,000.00 tax loss carryover; leaseholds and mortgaged resources. Upon the institution of a Chapter XI proceeding three more parties join this community of interest and must share in this "pot." The Court funds; compensable comittees and counsel; Court appointed officers and their counsel (Receiver or Trustee). The assets of course do not increase.

We point out that unlike a Chapter X proceeding where: debtor, trustee, creditor or shareholder may promulgate a plan; in a Chapter XI proceeding only the corporation (which we treat as one with its controlling shareholder) may propose a plan. Thus from a technical point of view classifying the debtor as a "bidder" is illogical, since it owns more than the assets offered for sale in this proceeding and we believe would be prohibited from purchasing them to the detriment of its creditors. (This would be collusion.)

Chapter XI also precludes a modification of secured indebtedness or leaseholds (although it permits a rejection of leases). Yet, to believe that a debtor may solve its problems without dealing with these classes of claimants is unrealistic. Of what good to Webcor would a settlement with its unsecured creditors be if the leases it needs to operate are cancelled, of what good to Webcor is an arrangement if it loses its plant through foreclosure. In order then to promulgate a plan the debtor must undertake, outside of Court, the financial burden of settling its difference with those classes of liabilities not drawn into the Court's purview.

Indulging the Court's patience, let us contrast the undertakings of the plan to that of IFR. The debtor's undertakings—as evidenced by its plan and the practical promulgation thereof—was to settle its unsecured indebtedness in an amount satisfactory to its creditors (as shown by the complete accord of the receiver, his attorney and creditors); of necessity to cure its secured indebtedness problems and leasehold problems; to liquidate its obligation to the Court; the Court's officers; officially appointed creditors representatives; to provide working capital enabling it again to retain its employees and preserve to all of its shareholders a percentage of their equity interest. Its financial backers—all rehabilitation proceedings must have financial backing; this is recognized in Sec. 393 of the Bankruptcy Act. 11 U. S. C. Sec. 793—undertook not only to provide the funds for unsecured creditors but undertook all other financial and physical burdens commensurate with the plan offered.

To be sure the backers would receive control of the entire "pot" but to do so they assumed the entire burden. Against this IFR purchased the manufacturer rights (above defined) and its only burden is the payment of one set sum. IFR did not assume the burden of liquidating the unsecured creditors; of dealing with lessors or secured creditors; of liquidating obligations incurred by the Bankruptcy Act and finally the financial responsibility of "making the whole business go." The undertakings of both parties are so different that to classify the debtor and its backers as bidders in the same sense as the limited undertaking of IFR is to blink at reality and logic. Such a holding renders it virtually impossible for a publicly held debtor having various classes of creditors in a Chapter XI proceeding to ever promulgate a meaningful plan, even though all classes could be rapidly and economically dealt with in such a proceeding. Resort would have to be to the

longer circuitous route of a Chapter X where of necessity full hearings are permitted. Congress did not intend such a result.

5. PERMITTING A SALE TO BE CONFIRMED WHILE AN UNINVESTIGATED PLAN WAS ON FILE IS NOT CONSISTENT WITH THE BANKRUPTCY ACT'S INTENTION.

It must be borne in mind that before this sale was had or confirmed the court had entered an order of insolvency and the debtor filed all of its schedules; a plan of arrangement and a petition praying for relief pursuant to chapter XI, thus meeting all tests of 11 U. S. C. Sec. 723.

11 U. S. C. Sec. 721 (321 Bankruptcy Act) provides:

> "A debtor may file a petition under this Chapter in a pending bankruptcy proceeding either before or after adjudication."

The filing of a petition and plan was, we respectfully submit, the filing of a petition pursuant to Section 321 after adjudication. As stated in 8 COLLIERS ON BANKRUPTCY, 14th Ed. Sec. 4.15 p. 462 and 8 COLLIERS ON BANKRUPTCY, 14th Ed. Sec. 4.16(11) p. 471, while a petition filed after adjudication does not act as an automatic stay of administration, even if a stay is not granted, "No step in administration can be taken which is based on Chapter I through VII which is inconsistent with the provisions of Chapter XI". The sale of the debtor's major assets prohibiting rehabilitation under Chapters I through VII are inconsistent with the provisions of Chapter XI, 8 COLLIERS ON BANKRUPTCY, 14th ed. Sec. 4.16(11), p. 471. *Cf. In Re Pure Penn Petroleum*, 188 F. 2d 851 (2nd Cir. 1951). Therefore, a sale should not have been held. This is the logic of the statute yet the Court of Appeals, although this issue was raised, rendered no opinion concerning it.

Its failure to do so renders the provision of the statute

completely ineffectual for if the court may, despite the filing of a 321 petition, move to place the debtor in a position where an arrangement is impossible without a full investigation, it becomes pointless to file a 321 petition. Congress did not intend such a result.

Moreover, the Court of Appeals' position negates Congress' intention as interpreted by this court in providing a speedy remedy for a publicly held corporation. The Senate said in Senate Report No. 2094, 85th Congress, 2nd Session (1958):

> "When a petition must be speedily filed to hold off marshals and sheriff, pro forma compliance with the requirement is the inevitable result . . ."

Now the shield of Congress has been removed and once again a race with liquidation occurs—now under Court protection—a result which Congress specifically sought to avoid. This race is now permitted to continue without any inquiry into the plan's meaning or consequence. Placing the debtor in a competing position does violence to the Act under whch it seeks protection.

CONCLUSION.

This is a case of first impression. It is the first time liquidation has been ordered instead of rehabilitation when a meaningful plan of arrangement has been proffered without a finding that the plan is unfeasible or not in the best interests of creditors as a whole.

It is also the first case (no other reported cases have been found) since the availability of Chapter XI to a public corporaton that the Court has been called upon to exercise its powers to protect the entire corporate community—debtor and public shareholder—in their efforts at rehabilitation. The effect of this decision is to render the

speedy economical Chapter XI impotent to a publicly held corporation with a semi-complicated financial structure that needs time and careful study by the Court, creditors, shareholders and debtor to promulgate a meaningful plan. The sole criteria will be the expediency of a "bid in hand" regardless of the avoidability of the economic catastrophy to all connected with it. If the decision stands the rules worked out by Congress and the Supreme Court for the use of this section become meaningless and resort must be had to the long, expensive—but protected—procedure of Chapter X. In the future the time within which to file schedules and a plan required by this decision will plague publicly held corporations in their efforts to seek rehabilitation through Chapter XI. For these reasons, we respectfully submit, the Court should grant the writ.

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APPENDIX.

IN THE UNITED STATES COURT OF APPEALS.

For the Seventh Circuit.

SEPTEMBER TERM, 1967 JANUARY SESSION, 1968

Nos. 16572, 16573, 16574, 16575, 16576, 16577

IN THE MATTERS OF:

WEBCOR, INC., an Illinois corporation, et al., *Bankrupt*,

WEBCOR SALES COMPANY, a New Jersey Corporation, et al., *Bankrupt*.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

FEBRUARY 7, 1968

Before KILEY, SWYGERT, and CUMMINGS, *Circuit Judges*.

SWYGERT, *Circuit Judge*. In these appeals, certain creditors and shareholders of Webcor, Incorporated and Webcor Sales Company, bankrupts,[1] primarily challenge orders of the Referee in Bankruptcy both refusing to set aside an order of adjudication and to reinstate Chapter XI proceedings and confirming the sale of the bankrupts' assets to International Fastener Research Corporation (hereafter I. F. R. C.).[2] The principal question posed by the appellants

1. Webcor, Incorporated owned all of the issued and outstanding shares of Webcor Sales Company. In these proceedings, the two companies have been treated as a single entity.

2. There are six appeals before the court comprised of two identical sets of three appeals from certain orders of the district court entered in the bankruptcy proceedings of Webcor Incorporated and Webcor Sales Company.

is whether the referee abused his discretion in proceeding to liquidate these corporations in bankruptcy rather than allowing them to attempt to effect a proposed plan of arrangement pursuant to Chapter XI. On the motion of the appellants, we granted an injunction *pendente lite,* restraining I. F. R. C. from in any way taking possession or disposing of the bankrupts' assets pending the outcome of these appeals. The bankrupts were granted leave to intervene and the hearing of the cases was expedited.

On July 5, 1967, Webcor, Incorporated and Webcor Sales Company filed petitions for an arrangement pursuant to Section 322 of Chapter XI of the Bankruptcy Act, 11 U. S. C. § 722. No plan accompanied the petitions. The following day a receiver was appointed to manage their property. On October 12, 1967, the referee entered an *ex parte* order directing the corporations to file a plan of arrangement by October 25, 1967 and setting a hearing for that date to consider whether to enter an order pursuant to Section 376(2) of the Bankruptcy Act, 11 U. S. C. 776(2), either adjudging them bankrupts or dismissing the Chapter XI proceedings. After notice to the parties, the receiver filed a petition with the referee on October 17, 1967 reciting an offer to purchase all of the corporations' assets for $1,030,000 and requesting a sale on return of bids. The referee entered an order on the same day authorizing solicitation of bids to be returned on November 6, 1967, fixing $1,030,000 as the upset price, and appointing appraisers.[3]

Because no plan of arrangement had been filed before the October 25 hearing, the referee entered orders adjudicating the corporations bankrupts on that date. Although the creditors' committee raised no objection to requests "to delay entering an order of adjudication until November

3. The appraisers valued the bankrupts' real and personal property at $1,081,422.33, filing their report on November 3, 1967.

6th" to give the corporations additional time to file a plan, the receiver's counsel informed the referee that their business had been closed for almost four months, that amounts in excess of $25,000 a month were being expended to preserve the assets of the estates, and that any delay might jeopardize the firm bid already received. At that time, the referee said: "I am going to enter an order of adjudication on the failure to present a plan, . . . And if between now and November the 6th a plan can be formulated that would deserve consideration, why we will consider it."

On November 2, 1967, the bankrupts filed a proposed plan of arrangement. The plan provided for full payment in cash of the costs of administration; full payment in cash of all claims and obligations incurred after July 5, 1967; full payment in cash of all claims entitled to priority under the Bankruptcy Act; full payment in cash of general unsecured claims in the amount of $100 or less; fifty per cent payment in cash of general unsecured claims in excess of $100 in six installments over a five-year period. All of the funds necessary to consummate the plan were to be provided by A. F. Dormeyer Corporation. In addition, the Dormeyer Corporation agreed to supply $750,000 in working capital and to issue 200,000 shares of its common stock to Webcor, Incorporated, receiving seventy-nine per cent of Webcor, Incorporated common stock in return.

On the morning of November 6, the bankrupts filed identhat morning, the bankrupts' counsel advised the referee ing the October 25 order of adjudication, reinstating the Chapter XI proceedings, and deferring "any action on any of the bids which may be made in the course of the hearing set for November 6, 1967." At the hearing on the motions that morning, the bankrupts' counsel advised the referee that he had discussed the proposed plan with the creditors' committee and suggested that any action on the bankrupts' motion be deferred "until the bids have been taken this

afternoon to see what the highest bid is that is made in this Court, . . .'' One of the counsel for the creditors' committee informed the referee that although there existed an ambiguity in the plan's language and a ''question of evidence of [Dormeyer's] ability to pay,'' the committee had no objection to delaying the consideration of the bankrupts' motions. The referee agreed to follow the suggestion, deferring any action on the motions until the completion of the bidding.

When the hearing reconvened on the afternoon of November 6, spirited bidding took place. I. F. R. C., the original bidder, registered the high bid of $1,775,000. One of the counsel for the creditors' committee, who stated that ''a representative group'' of the committee was present, requested a recess to consider the bid and the plan on file together with an apparent modification of the plan proposed by counsel for Dormeyer just prior to the close of bidding. Counsel for the bankrupts then elaborated with respect to the modification, representing that Dormeyer was prepared to make $1,800,000 available that afternoon or the next morning. Upon determining that the $1,800,000 was not a bid by Dormeyer, but rather represented funds to ''implement the plan,'' the referee suggested that counsel for the bankrupts, Dormeyer, and I. F. R. C. get together with the creditors' committee and the receiver to discuss these recent developments.

After a recess, the hearing reconvened. One of the counsel for the creditors reported to the referee that after talking to the various interests, ''we decided . . . to take a vote. . . . The vote was . . . by a majority, that we do business with a bidder under the bankruptcy sale, and that we reject all further dealings with the debtor under a plan.''[4] He also informed the referee that I. F. R. C.

4. It appears from the record that counsel for the bankrupts and Dormeyer in fact met with the committee.

had increased its bid to $1,825,000 and recommended acceptance. "On the recommendation of the creditors' committee," the referee accepted I .F. R. C.'s bid of $1,825,000. The following day, the referee entered two orders: one denying the motions of the bankrupts to vacate the order of adjudication and to reinstate the Chapter XI proceedings, the other approving and confirming the sale of the assets to I. F. R. C.

Petitions for review of these orders were filed by the appellants on November 15, 1967. On November 16, they applied to the referee for a suspension of his November 7 order confirming the sale until the petitions for review were disposed of. In an order entered the same day, the referee denied the application. On November 17, 1967, the appellants filed both a petition to review that order and a petition to stay the execution and enforcement of the November 7 orders.

Both the petitions for review and the petition to stay came before the district judge on November 20, 1967. After lengthy argument during which the bankrupts' counsel indicated that an amended plan was being prepared, the district judge denied both the petition to review the referee's order denying the application to suspend and the petition to stay the execution and enforcement of the November 7 orders.[5] With respect to the amended plan and the petitions to review the November 7 orders, the judge stated:

> The matters before me this morning for decision I will now decide, and then I will re-refer the matter to the Referee as to the petition that was brought in here this morning: First of all, the petitions to vacate and set aside various orders of the Referee, . . . are each

5. The order of the district court, denying the petition for a stay, is the subject of two identical appeals. Because the appellants' and the bankrupts' obtained a stay pursuant to orders of this court entered on December 4 and December 12, 1967, these appeals are now moot.

> and all denied. . . .[6] The Chapter 11 proceedings and the bankruptcy proceedings, including the petition of the parties for vacation of the order of adjudication and approval of a plan, as presented this morning, are hereby re-referred to the Referee with full authority to proceed under the provisions of the Chapter 11.

Two hearings were held before the referee, one on the afternoon of November 20 and the other on the following morning. During the course of the afternoon hearing, the amnded plan of arrangement was filed. During the hearing the next morning, the bankrupts filed an application to vacate and reconsider the orders of November 7 which was denied after a hearing.[7] On that afternoon, the parties again appeared before the district judge on a combined motion of the appellants to obtain the setting of a supersedeas bond and a stay of all proceedings for ten days. This motion was denied after a lengthy hearing. In closing, the district judge stated, "The Referee's orders of this morning are approved and confirmed."[8]

In support of their contention that the district court erred in affirming the referee's orders both refusing to vacate the order of adjudication and confirming the sale to I. F. R. C., the appellants primarily argue that the purpose of Chapter XI is to effect the rehabilitation of corpo-

6. This order of the district court, affirming the two orders of the referee entered on November 7 (denying the motion to vacate the order of adjudication and to reinstate Chapter XI and confirming the sale to I. F. R. C.) is also the subject of two identical appeals.

7. Between the time that the morning hearing before the Referee was completed and the time set for the commencement of the afternoon hearing before the district court, the receiver gave I. F. R. C. a bill of sale for the bankrupts' assets in return for the balance of the purchase price.

8. This order of the district court, affirming the referee's order denying the application to vacate and reconsider the orders of November 7, is the subject of the final two identical appeals.

rations experiencing financial difficulties rather than their liquidations. Thus they claim that the referee here abused his discretion in decreeing the death of a fifty-year old corporation employing hundreds of people.

Although we agree that Chapter XI provides a vehicle for rehabilitating financially ill corporations, that enactment by no means guarantees continued existence to every plagued corporation. As the Supreme Court stated in *SEC* v. *American Trailer Rentals Co.*, 379 U. S. 594, 618 (1965), "[I]t must be recognized that Chapters X and XI were not designed to prolong—*without good reason and at the expense of the investing public—the corporate life of every debtor suffering from terminal financial ills.*"

We believe the corporations had ample time to file a plant (their failure to do so being attributable to their own dilatory tactics) and therefore the October 25 order adjudicating them bankrupts was proper. When the order was entered, three and one-half months had elapsed since the filing of the Chapter XI petitions. Despite the fact that these corporations were in all probability acutely aware of their financial difficulties prior to July 6, not until two months later did they file the requisite schedules and statements.[9] In addition, their *business had ceased to operate approximately two months prior to July 6 and the receiver was expending in excess of $25,000 monthly to preserve their assets. Faced with these facts and with a firm bid for the purchase of the corporations' assets. . . .*" *in hand, the referee followed a prudent course on October 12* when he required the corporations to file a plan by October 25.

9. Section 324(1) of the Bankruptcy Act, 11 U. S. C. § 724(1) provides that "the court may, on application by the debtor, grant for cause shown further time, [beyond the filing of the Chapter XI petition] not exceeding ten days for filing . . . the schedules. . . ." The referee was extremely patient with the corporations which appeared to be in no particular hurry to effect their own rehabilitation.

Like prudence dictated his orders of October 17 setting the date for the sale and appointing appraisers. No plan having been filed by October 25, the referee complied with the literal terms of section 376(2) of the Bankruptcy Act, 11 U. S. C. § 776(2), in adjudicating the corporations bankrupts:

> If . . . an arrangement is not proposed in the manner and within the time fixed by the court, . . . the court shall—(2) where the petition was filed under section 322 of this Act, enter an order, upon hearing after notice to the debtor, the creditors, and such other persons as the court may direct, . . . adjudging the debtor a bankrupt. . . .

Since there was no petition for review of the order of adjudication, that order became final and nonappealable on November 4, ten days after entry, pursuant to section 39(3) of the Bankruptcy Act, 11 U. S. C. § 67(3). *In re Acme Furnace Fitting Co.*, 302 F. 2d 318 (7th Cir.), *cert. denied*, 371 U. S. 853 (1962). Thereafter any attempt to have this order vacated or set aside was addressed to the sound discretion of the referee. A motion to this effect, coupled with requests to reinstate Chapter XI and to stay the sale, was made by the bankrupts on November 6. Four days previously, a plan of arrangement had been filed. Pursuant to the suggestion of bankrupts' counsel, action on the motion was postponed until after the bidding to enable the creditors to compare the plan and the bid. On the recommendation of the creditors' committee, the referee accepted the bid, confirmed the sale, and denied the bankrupts' motion.

We note at the outset that a confirmed judicial sale, such as the one here, can be set aside on appeal only if the referee was guilty of an abuse of discretion. 4A Collier on Bankruptcy ¶ 70.98(17) (14th Ed. 1967). The appellants make no claim that the sale was not properly

conducted in every respect.[10] In order to support their assertion that the referee abused his discretion, they contend that a sale of all the corporations' assets in a Chapter XI proceeding can be sanctioned only in an emergency which they deny existed here. In addition, they contend that of the twenty-four members of the creditors' committee, only twelve were present at the November 6 hearing and that of those twelve, only a bare majority of seven voted to accept the bid rather than the plan.

In re Pure Penn Petroleum Co., Inc., 188 F. 2d 851 (2d Cir. 1951), is cited in support of the proposition that an "emergency" is a necessary prerequisite to a sale of all a corporation's assets in Chapter XI. Although the appellants correctly recite the holding of that case, the requirement there set forth is inapplicable to the instant situation in that the corporations here had previously been adjudicated bankrupts. Thus we need not concern ourselves with the problems that the Second Circuit sought to avoid in *Pure Penn*, "that a Chapter XI plan could bring about the same result as ordinary bankruptcy proceedings . . . minus the protective provisions which are part of the latter, especially as to a sale of all the assets." *In re Pure Penn Petroleum Co., Inc., supra* at 855. *Accord*, *In re Northern Illinois Development Corp.*, 324 F. 2d 104 (7th Cir. 1963), *cert. denied*, 376 U. S. 938 (1964).

There is likewise no merit to the appellants' other contention that the order confirming the sale was somehow vitiated by the referee's "reliance" on the recommendation of the creditors.[11] Although acceptance by a majority

10. See General Order 48(2).

11. The record indicates that counsel for the bankrupts and the proponent of the plan appeared before the creditors' committee on November 6, and therefore, we assume that they were aware of the committee's composition. However, they made no mention of this point to the referee when the hearing reconvened after the recess.

of the creditors is required prior to confirmation of an arrangement, there is no provision in the Bankruptcy Act dealing with ordinary bankruptcy liquidation which requires that a referee solicit, entertain, or follow creditors' recommendations or preferences. Since the price paid for the bankrupts' assets far exceeded their appraised value, we cannot substitute our judgment for that of the referee who, intimately familiar with the bankrupts' predicament, confirmed the sale.[12] *Cf. In re Marathon Foundry and Machine Co.*, 228 F. 2d 594, 598 (7th Cir. 1955), *cert. denied*, 350 U. S. 1014 (1956). If the referee had confirmed the sale without affording the proponents of the plan an opportunity to talk to the committee, we could not say that such action would have constituted an abuse of discretion. That the referee allowed such overtures and then purported to "follow" the committee's recommendation did not constitute an abuse of discretion either, but rather reflected a commendable effort on his part to afford the fullest opportunity to the competing interests to be heard.[13]

If parties are to be encouraged to bid at judicial sales, there must be stability in such sales and a time must come when a fair bid is accepted and the proceedings are ended. From a reading of the record, we are convinced that the proponents of the plan were, in effect, "competing bidders," both at the time of the sale and

12. We have yet to discover a convincing demonstration that the plan would have yielded substantially more for the creditors than the sale.

13. At the hearing on November 21, the referee stated:

> I had a right to depend upon and rely upon the representations made to me by counsel for the creditors' committee.
>
> This was not the sole determining factor in the acceptance or approval of this bid. If I had felt at the time that the bid was inadequate, the decision of the creditors' committee certainly would not be the final one. I extended to them on the same theory that the law functions an opportunity to express their views, to express their desire, and they did so.

thereafter. *Once the sale of the assets to I. F. R. C. was confirmed, the existence of fraud, mistake, or a like infirmity would be necessary to set that confirmed sale aside.* No allegations of such vitiating circumstances were made here. The bankrupts' amended plan filed on November 21 was merely a higher "bid," consideration of which was propery rejected by the referee. See 4A COLLIER ON BANKRUPTCY ¶ 70.98(17), at 1183-1193 (14th Ed. 1967). *Smith* v. *Juhan*, 311 F. 2d 670 (10th Cir. 1962). *In re Marathon Foundry and Machine Co.*, 239 F. 2d 122 (7th Cir. 1956), *cert. denied*, 353 U. S. 912 (1957).

After considering the appellants' contentions, we conclude that they are without substance. The referee acted well within his discretion in denying the application for reconsideration. Nor did the district court err on November 20 and 21 in approving the actions of the referee.

Our decision in this case on the merits necessarily reflects a denial of I. F. R. C.'s motion to dismiss these appeals. *In re Central Metallic Casket Co., Inc.*, 273 F. 2d 506 (7th Cir. 1960); *In re Tyne*, 261 F. 2d 249 (7th Cir.), *cert. denied*, 359 U. S. 974 (1959). *Cf. In re Drive-In Development Corp.*, 371 F. 2d 215 (7th Cir. 1966), *cert. denied*, 387 U. S. 909 (1967).

The orders appealed from are affirmed.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago, Illinois 60604.

Friday, January 12, 1968.

Before

Hon. Roger J. Kiley, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge,
Hon. Walter J. Cummings, Circuit Judge.

Nos. 16572, 16573, 16574, 16575, 16576, 16577.

In the Matter of:
Webcor, Inc., an Illinois corporation, et al.,
Bankrupt,

vs.

Webcor Sales Company, a New Jersey corporation, et al.,
Bankrupt.

The court has fully considered the briefs filed in these appeals and has heard oral arguments on the issues. Having reached its conclusion, the court now announces its decision and enters judgment in accordance with and for the reasons given in an opinion to be filed hereafter.

We are hereby disposing of six appeals, comprised of two identical sets of three appeals, from certain orders of the district court entered in two bankruptcy proceedings.

Two appeals are from "the order of the Honorable William Campbell, Judge . . . entered on November 20, 1967, denying certain petitions for review, from the orders entered by the Honorable Lawrence Miller, Referee in Bankruptcy, in the above-entitled cause."

On November 20, 1967, Judge Campbell, among other things denied "petitions to vacate and set aside various orders of the Referee" entered on November 7, 1967. One of the November 7, 1967 orders of the Referee denied the motion of Webcor, Inc. and Webcor Sales for "an order vacating the order of adjudication and reinstating the Chapter XI proceedings." The other November 7, 1967 order of the Referee "approved and confirmed" the sale of the assets of the bankrupts to International Fastener Research Corporation.

We affirm the order of Judge Campbell entered on November 20, 1967, with special reference to that portion of his order denying the petition to review the two orders of the Referee entered on November 7, 1967.

Two appeals are from "the order of the Honorable William Campbell, Judge . . . entered on November 20, 1967, denying petition to stay the execution and enforcement of orders of November 7, 1967."

These appeals are now moot.

Two "appeals" are from the "Order entered by the Honorable William J. Campbell, Judge . . . affirming the Order of Referee Lawrence J. Miller denying the Application to reconsider and vacate Orders dated November 7, 1967, said Application having been filed by the above captioned bankrupts, and said Order of Judge William J. Campbell having been entered on November 21, 1967."

The November 21, 1967 order of Judge Campbell here referred to was an oral order which "approved and confirmed" the Referee's oral "orders of this morning." No petition for review of the Referee's order of November 21, 1967, denying "the applications to reconsider and vacate the orders that I heretofore entered, and that have been affirmed by Judge Campbell, the orders of November 7," was before Judge Campbell on November 21, 1967. How-

ever, to fully dispose of the matters raised in these "appeals" we affirm Judge Campbell's actions on November 21, 1967 in these matters.

The order of this court on December 4, 1967, as modified by its order of December 12, 1967, is vacated insofar as said orders granted "the emergency motion to stay the Referee's order of sale dated November 7, 1967 in cause numbers 67-B-4934 and 67-B-4935 in the United States District Court for the Northern District of Illinois, Eastern Division."

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago, Illinois 60604.

Wednesday, March 27, 1968.

Before

Hon. Roger J. Kiley, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge,
Hon. Latham Castle, Circuit Judge.

In the Matter of Webcor, Inc., et al., *Bankrupt,* No. 16572, 3, 4, 5, 6, 7 *vs.* Silver, Inc., et al., *Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above entitled cause be and the same is hereby denied.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

Chicago, Illinois 60604.

Wednesday, March 27, 1968.

Before

Hon. John S. Hastings, Chief Judge,
Hon. Elmer J. Schnackenberg, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Roger J. Kiley, Circuit Judge,
Hon. Luther M. Swygert, Circuit Judge,
Hon. Thomas E. Fairchild, Circuit Judge,
Hon. Walter J. Cummings, Circuit Judge.

In the Matter of Webcor, Inc., et al., *Bankrupt,* No. 16572, 3, 4, 5, 6, 7 *vs.* Silver, Inc., et al., *Appellants.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS ORDERED by the Court, en banc, that the petition for rehearing en banc in this cause be and the same is hereby denied.

UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

Name of Presiding Judge, Honorable William J. Campbell, Chief Judge.

Cause No. 67 B 4934 Date Nov. 20, 1967

Title of Cause In the matter of Webcor, Inc., Bankrupt.

Brief Statement of Motion

Petition to stay execution and enforcement of order of November 7, 1967.

Petition to stay execution and enforcement of orders of November 7, 1967, are denied. The petition to find the Chapter 10 herein as having been filed in good faith is denied and the Court finds that the said petition was not filed in good faith and accordingly same is dismissed.

The Chapter 11 proceedings & the bankruptcy proceedings, including the petition of the parties for vacation of the order of adjudication and approval of a plan are hereby re-referred to the Referee with full authority to proceed under provisions of Chapter 11.

UNITED STATES DISTRICT COURT

Northern District of Illinois,

Eastern Division.

Name of Presiding Judge, Honorable Campbell.

Cause No. 67 B 4934 and 67 B 4935 Date Nov. 21, 1967

Title of Cause Webcor, Inc., Bankrupt and Webcor Sales Company, Bankrupt.

Brief Statement of Motion
set supersedeas bond.

Names and Addresses of moving counsel

Leonard Gesas, Lawrence M. Cooper, Robert M. Woodward, I. Harvey Levinson and Melvin E. Levinson, 69 W. Washington, Chicago, Ill. 60602, 332-4070.

Representing petitioners.

Motion for supersedeas bond is denied. Motion for an injunction and setting of a bond in support is likewise denied. The Referee's orders of this morning are approved and confirmed.

(Causes Nos. 67 B 4934 & 67 B 4935)

ORDER.

This matter coming on to be heard this 25th day of October, 1967, upon the hearing of the first meeting of creditors under Chapter XI and upon the hearing set under Section 376(2) to consider the entry of an order either adjudicating the Debtor a bankrupt and directing that bankruptcy be proceeded with, or dismissing the proceedings under Chapter XI thereof, said hearing having been set before this Court for October 25, 1967, due notice in writing of said hearings having been given to all known creditors, and the Court having held said hearings and having heard the statements of counsel for parties in interest, made in open Court.

The Court finds that the Debtor filed its voluntary petition for arrangement under Chapter XI on to-wit: July 5, 1967, without a Plan; that on the Debtor's own motion a Receiver was appointed on July 6, 1967;

[96] The Court further finds that the business of the Debtor had been shut down by the Debtor approximately two months prior to July 5, 1967, and has continued to be closed during the receivership, except for the plastics division;

The Court further finds that the Debtor, the unofficial Creditors' Committee, the Receiver and his Counsel have met on many occasions for the purpose of working out a Plan of Arrangement, without success;

The Court further finds that the delay in the filing of a Plan of Arrangement, or in the alternative, the entering of an Order of Adjudication, is costing this estate in ex-

penses for maintenance of said plant, in excess of Twenty-Five Thousand Dollars ($25,000.00) per month;

The Court further finds that no Plan of Arrangement has been filed to date, and that it is in the best interests of the estate herein that a stand-by Trustee be appointed by reason of the possibility of a suitable Plan being presented before the return of bids is acted upon by this Court;

The Court further finds that no nomination for a stand-by Trustee was made by creditors in opposition to the designation of Frank M. Whiston, heretofore acting as Receiver herein, as stand-by Trustee.

[97] IT IS THEREFORE ORDERED that Webcor, Inc., Debtor herein, be and is hereby adjudged a bankrupt that bankruptcy be proceeded with under the provisions of the Bankruptcy Act.

IT IS FURTHER ORDERED that Frank M. Whiston be, and he is hereby appointed stand-by Trustee.

October 25, 1967

(Causes Nos. 67 B 4934 & 67 B 4935)

ORDER.

At Chicago, Illinois, in said
District and Division on
November 7, 1967.

This cause coming on to be heard upon the return of bids, pursuant to the order of this Court of October 17, 1967, and pursuant to the terms and conditions of sale and statement of assets, attached hereto and made a part hereof, and marked as Exhibit A for identification, read in open Court on November 6, 1967, at 2:15 P.M., prior to the taking of the bids, copies of which were distributed to persons in attendance in the courtroom, and the same being clarified in open court by counsel, and pursuant to notice to all creditors and the general public, said return of bids coming on for [119] hearing on November 6, 1967, before the Honorable Lawrence J. Miller, Referee in Bankrutpcy, said return of bids being for the property described in the statement of assets attached hereto and made a part hereof and as clarified in statements of counsel made prior to bidding at said hearing, specifically including but not limited to the announcement that certain property, as set forth in Exhibit B, attached hereto and made a part hereof, is contained upon the premises, allegedly under lease, and upon said property so enumerated, only the right, title and interest of Frank M. Whiston, Receiver and Standby Trustee is sold.

And by the direction of this Court, Frank M. Whiston, Receiver and Standby Trustee herein, having heretofore accepted a guaranteed bid of $1,030,000.00 together with

a security deposit, as an upset price but subject to further bidding at said return of bids, and upon said bidding in open Court, the highest and best bid, of a series of bids, was made by International Fastener Research Corp., (hereinafter referred to as IFR), in the sum of $1,825,000.00 and said amount being substantially in excess of the aforesaid upset price, as well as being substantially in excess of the appraisal herein, and said purchaser having deposited the sum of $550,000.00 with Frank M. Whiston, Receiver and Standby Trustee, as security, pursuant to the terms of sale.

[120] And the Court having received the report and recommendation of the Creditors' Committee, made by its counsel in open Court, whereby said Creditors' Committee urged and recommended the approval and acceptance of said bid.

Now, THEREFORE, IT IS HEREBY ORDERED that the sale of the assets, said assets being more particularly described in Exhibit C attached hereto, to IFR and/or its designated Nominee for the sum of One Million Eight Hundred Twenty-Five Thousand Dollars ($1,825,000.00) be and it hereby is approved and confirmed; and

IT IS FURTHER ORDERED that the Receiver, the debtors and the Trustee shall execute and deliver deeds, bills of sale, assignments and such other documents and instruments as may be required or necessary in order to fully and finally consummate said sale, and to effectively transfer, assign, convey and grant to IFR and/or its Nominee, title to the assets described in Exhibit C; and

IT IS FURTHER ORDERED that title to all of the assets of the debtors, tangible and intangible, except as specifically excluded or otherwise modified or excepted by the provisions of said bill of sale attached as Exhibit C hereto, shall be, and hereby is, vested in IFR and/or its Nominee, free and clear of all liens, charges, encumbrances, taxes and

adverse claims and demands, and all creditors of the debtors be and they are [121] hereby restrained and enjoined from interfering with the peaceful possession and the right, title and interest of IFR and/or its Nominee in the assets of the debtors which are the subject of this sale order; and

IT IS FURTHER ORDERED that IFR shall pay the full balance of the purchase price to the Receiver or to any successor Trustee in Bankrutpcy within one banking day after this order becomes final and non-appealable, and in the event that IFR shall fail to so pay in full the balance of the purchase price, and provided the Receiver, the debtors and any successor Trustee in Bankruptcy are not in default with respect to the obligations imposed upon them hereunder, then in that event all of the funds heretofore paid or deposited by IFR on account of the purchase price shall be forfeited by it and IFR shall have no further right, title, interest, lien, charge or encumbrance in or to or against any of the assets of the debtors or these debtor estates, except, however, said deposit shall not be forfeited unless and until demand is made for the balance of the purchase price at or after it is due, and said balance is not paid within 24 hours after receipt of said demand by IFR. In the event that this order does not become final on or before the eleventh day after its entry, then in that event IFR shall, in its sole option and discretion, be relieved from all of the provisions of this order and its bid shall be deemed rescinded and the Receiver or successor [122] Trustee shall immediately return to IFR, without charge, deduction or offset, all of the funds heretofore paid or deposited by it on account of said purchase price, and thereafter IFR shall have no right, title, interest, lien, charge or encumbrance in and to any of the assets of the debtors or the debtor estates, and the debtors, Receiver and successor Trustee shall have no claim, demand or cause of action against IFR.

Dated: November 7, 1967

(Causes Nos. 67 B 4934 & 67 B 4935)

ORDER.

At Chicago, Illinois, in said
District or Division on
November 7, 1967

This cause coming on to be heard upon the motion of the Debtor in the prior proceedings for an arrangement, said motion bearing the caption of Webcor Sales Company, to vacate the order of adjudication entered herein on October 25, 1967, and for an order reinstating the arrangement proceeding heretofore filed on July 5 and to defer any action on bids returnable on November 6, 1967, at 2:00 P.M., said Debtor's motion being likewise noticed for the same day at 10:00 A.M.; [115] that a copy of the aforesaid plan of arrangement was attached to the said notice and motion of the Debtor to vacate the order of adjudication; said plan of arrangement proposed by the Debtor, bearing the caption of In the Matter of Webcor, Inc., No. 67 B 4934 and Webcor Sales Company, No. 67 B 4935, was filed herein on November 2, 1967, without prior leave of Court, and the aforesaid motion having been continued to 2:00 P.M. of November 6, 1967, after the return of bids, at the suggestion of counsel for the Debtor;

And the Court having held the return of bids, pursuant to prior order of this Court, with notice to all creditors and the public, well advertised at considerable expense, after having received a guaranteed bid for the purchase of the assets therein set forth, and after a series of higher bids, having obtained a high bid of $1,775,000.00, the Court declared a recess for the purpose of receiving the recommendations and guidance of the Creditors' Committee

herein, representing creditors totalling $1,500,000.00; that said Creditors' Committee was directed to promptly convene and to consider the acceptance or rejection of the highest bid, with counsel for the Debtor present, and the Receiver and his counsel present; that [116] during the course of the bidding counsel for A. F. Dormeyer Corp. requested permission to talk about the proposed plan, but was told by the Court the hearing was on bids, and after the highest bid was received and the bidding concluded, pending the deliveration and recommendation of the Committee, said counsel for A. F. Dormeyer Corp. stated he would obtain the sum of $1,800,000.00, not for a bid, but for a plan.

That upon the completion of the deliberations of the Creditors' Committee, its counsel thereupon stated to the Court that it had heard all parties, including the highest bidder, International Fastener Research Corp., requested said bidder to increase his bid to $1,825,000.00, which was acceptable, and the said Committe did thereupon recommend to the Court that said sum of $1,825,000.00 be approved by the Court. and that the proposed plan was not acceptable, and that tne motion relating thereto be denied.

And the Court having considered the proceedings of record herein prior to the date of the entry of an order of adjudication, and having considered the excellent results of the bidding, substantially in excess of the appraisal, and especially considering the diligent efforts of the Committe, its report and recommendation as set [117] forth hereinabove,

IT IS HEREBY ORDERED that the motion, supported by the applications of Webcor, Inc. and Webcor Sales Company. Debtors in the proceedings for arrangement prior to the order of adjudication herein, for the entry of an order vacating the order of adjudication and reinstating the Chapter XI proceedings, be and the same is hereby denied.